In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1401

GABRIEL BADARACCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court adjudicated him guilty and sentenced him without providing him adequate opportunity to present mitigating facts, and that 8 U.S.C. 125(a)(11), providing for deportation of aliens convicted of narcotics violations, is unconstitutional.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a controlled substance (cocaine), in violation of 21 U.S.C. 844(a).[1] He was adjudicated guilty and sentenced to two years' probation. The court of appeals affirmed *per curiam* (Pet. App. 1).

The evidence showed that on January 17, 1974, petitioner, a Dutch citizen, arrived at Miami International

[1]The jury acquitted petitioner of having imported cocaine into this country.

Airport from Curacao, Netherlands Antilles. Customs agents noticed that he appeared nervous and walked with a slight limp. A search revealed that petitioner had 14.9 grams of cocaine[2] (wrapped in seven individual tinfoil packets) under his pants.

1. The record refutes petitioner's claim that the district court adjudicated him guilty and sentenced him while under a misapprehension as to the consequences of the conviction and without giving him adequate opportunity to present facts in mitigation.

After the jury verdict of guilty on June 11, 1974, the court advised petitioner that sentencing would take place on the following day at 3:00 p.m. (App. 13).[3] Petitioner made no objection to this procedure. At the sentencing hearing on the following day, petitioner's counsel delineated some of the adverse consequences to petitioner that would or might result from an adjudication of guilt. This discussion included the following colloquy (App. 17-18):

> MR. BARTEL: Your Honor, I hope we have set out in the brief period of time allotted the unusual predicament that this defendant finds himself. If

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[2]Petitioner's statement (Pet. 3) that he was charged and convicted of possession of 1.25 grams of cocaine is erroneous. See the information, verdict and judgment reproduced in the Appendix on appeal (App. 1-3), a copy of which we are lodging with the Clerk of this Court. That Appendix is hereafter referred to as "App.".

[3]21 U.S.C. 844(b)(1) provides in pertinent part:

> If any person who has not previously been convicted of [simple possession of a controlled substance] * * * is found guilty of a violation * * * the court may, without entering a judgment of guilty * * * place him on probation * * * . [U]pon expiration of [probation] the court shall discharge such person and dismiss the proceedings against him. * * * Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime * * * .

> your Honor should mete out an adjudication there would be some severe indirect consequences that would accrue, particularly the strong possibility of deportation immediately and the severance of this defendant from his family.
>
> THE COURT: Now, it is a misdemeanor, is it not?
>
> MR. BARTEL: Yes, sir. But I am concerned that the narcotics deportation act may not make a distinction between a felony and a misdemeanor. I sincerely believe that would be the case.
>
> THE COURT: You are not absolutely sure but that is your belief at the moment?
>
> MR. BARTEL: Well, I have found one citation—one of the unfortunate consequences of having been asked to present this matter under short notice—but I have one citation, 8 USC 1215, and it seems to provide that any law relating to the illicit possession of a narcotic drug gives rise to the right of deportation.

Petitioner's counsel further indicated that a narcotics conviction might affect his client's opportunities to enter graduate school and become a Certified Public Accountant (App. 19-23). The court also received, prior to sentencing, letters of support from petitioner's father, two college professors, and the Bishop of the Netherlands Antilles (App. 17).

After hearing the arguments presented by counsel for petitioner and the prosecution, the court stated (App. 27-28):

> THE COURT: Because of the nature of this offense and all the circumstances, I feel that the withholding of adjudication should not occur and that there should be adjudication.

> Therefore, Gabriel Badaracco, upon a verdict of guilty as to Count 2 which was rendered by a jury yesterday, the Court now adjudges you guilty.
>
> I have reflected probably more intensely on this case than counsel's short time reference would indicate, and I am prepared now to proceed with the sentencing.
>
> It is adjudged that imposition of sentence of confinement will be withheld and you, Gabriel Badaracco be placed on probation for a period of two years under the standing conditions of probation as defined by the Court's order entered August 1, 1964; except that during the period of your absence from the United States you shall not be required to report to the probation officer.

In short, the record discloses that the district court was clearly advised that upon adjudication of guilt petitioner would be subject to possible deportation,[4] and, accordingly, the adjudication was not rendered as a result of a mistake of law.[5] In any event, the trial court determined, in the exercise of its discretion, regardless of the possible collateral effects, that petitioner's offense required an adjudication of guilt.[6]

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[4]Deportation under Section 1251 does not necessarily follow automatically upon commission by an alien of any of the acts specifically listed therein as grounds for deportation. The Attorney General may and does in appropriate cases exercise his discretion to decline to bring proceedings under that section.

[5]As petitioner notes, the Assistant United States Attorney stated that he did not think petitioner would be deported (App. 25). A reading of this statement in context, however, shows that it was not intended as a representation of the law or of government policy; indeed, the prosecutor indicated that he was not certain as to the immigration implications of petitioner's adjudication (App. 26).

[6]Petitioner also argues that the trial court's uncertainty of deportation as a consequence is further manifested by its subsequent recommendation against deportation. However, this recommendation was added solely at the request of defense counsel (App. 29) and it did not indicate anything about the court's views as to the possible deportation of petitioner.

Nor did the court impermissibly limit petitioner in his ability to present facts in mitigation. The court had before it several character references (at least two of which had been prepared a week prior to trial (App. 38, 39)), and it acted within its broad discretion in determining not to avail itself of a presentence report. See, *e.g.*, *United States* v. *Rosciano*, 499 F.2d 166, 168-170 (C.A. 7).

2. The Immigration and Naturalization authorities have not commenced deportation proceedings against petitioner, and therefore his challenge to the constitutionality of 8 U.S.C. 1251(a) is premature. *O'Shea* v. *Littleton*, 414 U.S. 488. In any event, Congress has plenary power to establish the conditions under which aliens may enter and remain in this country (*Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589) and, accordingly, does not offend the Equal Protection Clause or substantive due process by providing for the deportation of alien violators of the narcotics laws.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.